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No. 01-1184

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

FRANCISCO JIMENEZ RECIO
AND ADRIAN LOPEZ-MEZA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amici Curiae of the American Center for Law and Justice and Hons. Walter B. Jones, Jim Ryun, and J.C. Watts Jr. Supporting Petitioner

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INTEREST OF AMICI*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. As a public interest law firm the ACLJ is dedicated to the concept that freedom and democracy are God given inalienable rights that must be protected both domestically and internationally.

ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the Supreme Court of the United States and lower federal courts, and Chief Counsel Jay Alan Sekulow has presented oral argument before this Court in eight cases.

As a public interest law firm devoted to the defense of constitutional liberties, the ACLJ has vital interest in the preservation of our constitutional system. Terrorism represents a real and present threat to that system. Reversing the Ninth Circuit's decision in *Recio* will remove a substantial impediment to the fight against terrorism while posing little or no danger to the legitimate rights of Americans.

This brief is filed on behalf of Representatives Walter B. Jones, Jim Ryun, and J.C. Watts Jr., all of whom are members of the United States House of Representatives. Each of these amici currently serves in the One Hundred Seventh Congress. These Representatives disagree with the

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* This brief is filed with the consent of the parties and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

Ninth Circuit's decision in *United States v. Recio* and desire the Supreme Court to reverse this decision, thus upholding the long line of Supreme Court precedent in the area of conspiracy law. Because of the current climate that exists in the United States as a result of the terrorist attacks on September 11, 2001, it is more important than ever that the legislative and executive branches have the tools needed to stop and prosecute conspirators who would seek to attack Americans both at home and abroad.

The amici Representatives have dedicated time and effort to defending and protecting Americans in the wake of September 11th. It is this commitment to America's safety and security that compels them to support the reversal of the Ninth Circuit's decision in *United States v. Recio*. Amici take the position that the decision below hamstrings law enforcement officials in their efforts to fight terrorism. Terrorism, like the war on drugs, requires covert operations that are vital to frustrating and preventing the actual crime. After September 11th it is abundantly clear that such atrocities must be stopped. It is also clear that the masterminds of such evils must be prosecuted and if convicted jailed, thus preventing their involvement in future terrorist acts. They must not be allowed to simply walk away from justice due to the success of the government at foiling their planned operation. This is exactly what would happen if the decision below is allowed to stand. Amici, therefore, urge this Court to reverse the erroneous decision of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

The decision below finds no support in the law of conspiracy and effectively hamstrings law enforcement officials in their efforts to purge the societal evil of drug trafficking; however, the decision has far more serious

implications. The question of whether a conspiracy ends as a matter of law when the government frustrates its objective will determine the government's ability to combat a far more pernicious and immediate threat facing our nation – that of terrorism. The *Recio* decision substantially impedes law enforcement efforts in the fight against terrorism, where, like the war on drugs, covert operations are vital to frustrating and preventing a planned terrorist offensive as well as prosecuting the conspirators.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION DEPARTS FROM LONG ESTABLISHED PRINCIPLES OF CONSPIRACY LAW.

In *United States v. Recio*, 258 F.3d 1069 (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit reversed the conspiracy convictions of two men arrested in a sting operation that caught them transporting approximately $12 million worth of cocaine and marijuana. Despite overwhelming evidence of their agreement to transport the drugs and their commission of acts in furtherance of that agreement, the court concluded that there was insufficient evidence linking the men to the conspiracy before the government had intervened and frustrated its objective. The court adopted the rule that when a conspiracy's objectives have become factually impossible – such as when the government intervenes – the conspiracy necessarily ends. *Id.* at 1071-72. This approach taken by the Ninth Circuit conflicts with the black letter conspiracy law set forth by this Court as well as other courts.

A. Conspiracy is a Distinct Crime and May be Punished Whether or Not Its Objective Is Actually Achieved.

The Ninth Circuit's arbitrary limitation on the duration of a conspiracy is unprecedented. It is a fundamental principle of conspiracy law that the duration of a conspiracy is determined by "the scope of the conspiratorial agreement," not by whether the ultimate objective is achieved. *Grunewald v. United States*, 353 U.S. 391, 397 (1957). As this Court has explained, liability for conspiracy even though the ultimate goal has been frustrated is justified because "the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas v. United States*, 522 U.S. 52, 65 (1997).

Recent discussion in legal periodicals has also emphasized this principle:

> [I]f the act of conspiring leads people moderately disposed toward criminal behavior to be more than moderately disposed, precisely because they are conspiring together, it makes sense, on grounds of deterrence, to impose independent penalties. . . . The key point is that the act of conspiracy has an independent effect, that of moving people in more extreme directions. The point holds for terrorists as well as for everyone else.

Sunstein, *Why they Hate Us: The Role of Social Dynamics*, 25 Harv. J.L. & Pub. Pol'y 429 (Spring 2002) (internal citations and quotation marks omitted).

This Court has described the crime of conspiracy as "an offense of the gravest character":

> It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

United States v. Rabinowich, 238 U.S. 78, 88 (1915). As such, the criminal agreement itself is the *actus reus*. The common law understanding of conspiracy "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash v. United States*, 229 U.S. 373, 378 (1913). *See also Iannelli v. United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act") (citations omitted). Thus, the crime of conspiracy is complete whether or not the substantive crime which was its object was committed. *See United States v. Feola*, 420 U.S. 671, 694 (1975) (concluding that conspiracy law permits conviction for agreement and overt act, regardless of whether the crime agreed upon is actually committed); *United States v. Hsu*, 155 F.3d 189, 203 (3d Cir. 1998) ("The impossibility of achieving the goal of a conspiracy is irrelevant to the crime itself").

The rule applied by the Ninth Circuit conflicts with the decisions of other federal circuits and state supreme courts rejecting factual impossibility as a defense to conspiracy. *See, e.g., United States v. Hsu*, 155 F.3d 189, 203 (3d. Cir. 1998) (impossibility is not a defense to conspiracy); *United States v. Sobrilski*, 127 F.3d 669, 674-75 (8th Cir. 1997), (same) cert. denied, 522 U.S. 1134, 1152

(1998); *United States v. Belardo-Quinones*, 71 F.3d 941, 944 (1st Cir. 1995) (conspiracy may exist even if the object of the conspiracy cannot be achieved); *United States v. Clemente*, 22 F.3d 477, 480-81 (2d Cir. 1994) (factual impossibility is not a defense to conspiracy); *State v. Houchin*, 765 P.2d 178, 179-80 (Mont. 1988) (factual impossibility, which exists "when the contemplated act is an offense, but it cannot be carried out due to facts unknown to the conspirators," is not a defense to conspiracy charge); *State v. Moretti*, 244 A.2d 499, 503-04 (N.J. 1968) ("We hold that when the consequences sought by a defendant are forbidden by the law as criminal, it is no defense that the defendant could not succeed in reaching his goal because of circumstances unknown to him"), cert. denied, 393 U.S. 952 (1968).

B. The Decision Below Greatly Overstates the Government's Burden of Proof.

The crime of conspiracy in this case consists of two elements: (1) an agreement to possess with intent to distribute narcotics; and (2) knowledge of the agreement's objectives and an intent to further them.[1] The prosecution must prove each of these elements beyond a reasonable doubt; however, this Court has recognized that because secrecy and concealment are essential features of any

[1] A charge of general criminal conspiracy under federal law consists of four elements: (1) an agreement between at least two parties, (2) to commit an unlawful act, (3) where the parties knew of the conspiracy and voluntarily participated in the conspiracy, and (4) where at least one conspirator committed an overt act in furtherance of the conspiracy. 18 U.S.C. § 371 (1994); *See also* 18 U.S.C. §2332(b)(2000) (setting out requirements for conspiracy to commit terrorism). In narcotics conspiracies, the government's burden is lessened in that it need not prove the commission of any overt acts in furtherance of the conspiracy. *See United States v. Shabani*, 513 U.S. 10, 16 (1994); 21 U.S.C. § 846.

successful conspiracy, the government need not prove that a defendant had intimate knowledge of the conspiracy's details:

> [T]he law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and [the conspirators'] connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Blumenthal v. United States, 332 U.S. 539, 557 (1947).

It is well established that circumstantial evidence alone is a sufficient basis for a conspiracy conviction. *United States v. Agofsky*, 20 F.3d 866, 870 (8th Cir. 1994) (holding that a conspiracy can be inferred from circumstantial evidence due to the secretive nature of conspiracies). For example, it is not necessary for the government to prove a formal agreement; instead, the agreement required to sustain a conspiracy conviction can be inferred from the defendant's actions. See, e.g., *Hamling v. United States*, 418 U.S. 87, 124 (1974). Likewise, acts committed in furtherance of the conspiracy are often enough to show that the conspirator was a knowing participant. See *United States v. Cassiere*, 4 F.3d 1006, 1015 (1st Cir. 1993).

A federal district court evaluating a motion for a bill of particulars made in the case against Osama bin Laden elaborated on the government's burden of proof:

> The existence of a conspiracy and a defendant's participation therein is usually established by circumstantial evidence based upon independent proof of each alleged co-conspirator's acts, conduct and statements and the totality of conduct of all the participants and the reasonable inferences to be drawn therefrom.

United States v. Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y. 2000) (internal citations and quotation marks omitted). The court explained, therefore, that the government is not required to prove "exactly when or how a conspiracy was formed or when a particular defendant joined the scheme . . . ." *Id.* at 242.

This is significant because it is not uncommon for a member of a conspiracy, either drug or terrorist, to have limited information, pertaining primarily to his specific role.[2] The law does not permit this to limit his culpability: "Once a conspiracy exists, evidence establishing beyond a reasonable doubt defendant's connection with the conspiracy, even though the connection is slight, is sufficient to convict defendant of knowing participation in the conspiracy." *United States v. Bautista-Avila*, 6 F.3d 1360, 1362 (9th Cir. 1993) (citations and quotation marks omitted).

As will be discussed in section II.A., the court below, because of its holding that the charged conspiracy ended

[2] For example, Osama bin Laden claimed in a widely broadcast videotape that some of the September 11 hijackers did not know of their group's ultimate plan until the very end. Brooke A. Masters, *High Price of Opening A Window on Terror; Man Faces Deportation After Sept. 11 Testimony*, The Washington Post, May 5, 2002, at A1. Conspiracy law does not permit this fact to mitigate against finding their involvement in the broader conspiracy.

when its purpose was thwarted, virtually ignored overwhelming evidence, albeit circumstantial, of respondent's knowing participation in the conspiracy. In doing so, the court ignored its obligation to review the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999). Essentially, the court invaded the jury's province by going beyond questioning the sufficiency of the evidence and effectively arguing the weight of the evidence.

II. PERMITTING THE DEFENSE OF IMPOSSIBILITY IN CONSPIRACY LAW PLACES UNACCEPTABLE OBSTACLES IN THE WAY OF LAW ENFORCEMENT OFFICIALS ENGAGED IN THE WAR ON TERROR.

The effect of *Recio* is to exclude relevant, probative evidence of guilt following successful and legitimate intervention by law enforcement, thereby handicapping the prosecution of conspiracy cases and exonerating culpable defendants. Due to the shared characteristics of drug organizations and terrorist networks, this precedent will adversely impact the prosecution of terrorist conspiracies in a similar manner. Consequently, the more imminent practical effect of the decision below is to subconsciously focus law enforcement officials not on stopping crime and catching criminals, but ensuring that their evidentiary backsides are sufficiently covered before they intervene in criminal activity.

A. The Decision Below Requires the Exclusion of Relevant, Probative Evidence and Exonerates Culpable Defendants.

Respondents would have the Court believe that the Ninth Circuit's opinion merely prevents law enforcement officials from stopping criminal activity, luring people into becoming involved through the use of informants, and then charging them with conspiracy. In truth, the *Recio* decision is far broader, diminishing or eliminating altogether the evidentiary value of vital undercover investigations and operations aimed at thwarting conspiracies. Judge O'Scannlain, in his dissent from the Ninth Circuit's denial of rehearing en banc, characterized the panel decision as constituting "a de facto evidentiary exclusionary rule" with one important distinction:

> Unlike the exclusionary rule familiar from the Fourth and Fifth Amendment contexts, . . . the Cruz/Recio corollary is not triggered by, nor does it deter, wrongful conduct on the part of law enforcement officers. Indeed, the reverse is true: the paradoxical effect of Cruz and Recio is to exclude evidence of guilt following successful and entirely legitimate intervention by law enforcement agents.

United States v. Recio, 270 F.3d 845, 848 (9th Cir. 2001) (O'Scannlain, J., dissenting).

Moreover, any alleged concerns about improper law enforcement methods in "sting" operations are adequately provided for in the body of conspiracy law itself. For example, under federal conspiracy law it is impossible for an individual to conspire only with someone acting at the behest

of the government.[3] In other words, an individual who "conspires" to violate the law with only one other person who is a government agent or informant who secretly intends to frustrate the conspiracy fails to meet the formal requirements of conspiracy: "It is a well-established rule that there can be no indictable conspiracy involving only the defendant and government agents and informers." *United States v. Pinque*, 234 F.3d 374, 378 (8th Cir. 2000). The rationale behind this defense is that "[t]here is neither a true agreement nor a meeting of the minds when an individual 'conspires' to violate the law with only one other person and that person is a government agent." *See United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984).[4]

As explained in more detail below in section II.B.2., drug organizations and terrorist networks share a need for proven loyalty and trust among members that makes it unlikely that an outsider would be recruited at the last minute

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[3] Under some state law, an individual may be convicted of conspiracy regardless of the status or intent of his co-conspirator, even where the sole co-conspirator is actually a police officer. Likewise, under the unilateral approach of the Model Penal Code, "the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned." Secs. 5.03, cmt. 2(b) at .400 (1985).

[4] This defense, however, is subject to two important limitations. First, the rule that government agents do not count as co-conspirators is relevant only in situations where the conspiracy involves only one defendant and a government agent or informer. It is inapplicable in cases involving a bona fide co-conspirator. Therefore, while a government agent cannot be a co-conspirator, the involvement of a government agent in no way destroys a conspiracy in which at least two individuals have agreed to engage in criminal activity. *See United States v. Medina*, 32 F.3d 40, 44 (2d Cir. 1994). Secondly, this defense is limited in that a co-conspirator may under certain circumstances act as an informant without losing his status as a conspirator. *See United States v. DeSapio*, 435 F.2d 272, 281-83 (2d Cir. 1970) (As long as the informant acts on his own in the conspiracy and is not directed in his participation by the government, he does not become a government agent by merely providing information to the government.)

to carry out the most important part of the conspiracy. This fact too should allay concerns about police "sting" operations entrapping the innocent. Common sense and the nature of terrorist cells dictate the unlikelihood that a mission with so much at stake[5] would be entrusted to someone not already a part of the broader conspiracy.

In arriving at its decision, the court below summarily discounted a substantial amount of relevant, probative, legitimately obtained evidence of the respondents' involvement in the conspiracy. For example, prosecutors in *Recio* presented evidence of 1) respondents' use of prepaid calling cards to make telephone calls to the place the drugs were to be delivered; 2) respondents' possession of multiple pagers; 3) multiple receipts for expired non-owner insurance policies found in Recio's possession supporting the inference that he habitually drove drug trucks; 4) respondents' words and conduct upon arrest; and finally, 5) expert testimony demonstrating that "the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment." *United States v. Recio,* 258 F.3d at 1071-72. The court also disparaged expert testimony that "communication devices typically used by complex drug organizations are cell phones and pagers because the users of these devices can be physically located anywhere, untraceable by the authorities." *Id.* at 1080 (Gould, J., dissenting). This was testimony that a jury could have properly given weight. Given the similarities between drug and terrorist organizations and investigations, prosecutions

[5] Al-Qaeda's operations are meticulous, with some plans in the works for months if not years. The operations are also clever, and bin Laden himself is very much hands-on. For example, the 1993 World Trade Center bombers cased the twin towers multiple times, looking not just at security but the points under the trade center where an explosion could do the most damage. Similarly, the East Africa embassy bombers phoned in credible threats to the embassy and then observed the embassy response. *Osama Bin Laden: FAQ*, www.msnbc.com/news/627355.asp?cp1=1 (visited June 30, 2002).

of the latter will rely on the same genre of evidence. As the dissent pointed out, "[t]his case poses an important issue concerning the scope of reasonable inferences that may be drawn by a jury from evidence of criminal conspiracy." *Id.* at 1078 (Gould, J., dissenting).

Given that the communication methods of terrorist networks mirror those used by the drug conspirators in this case, the same type of evidence will be at risk under the precedent of *Recio*. It has been reported that Osama bin Laden stopped using satellite phones when he discovered that the United States was intercepting his communications off the Inmarsat-3 satellite over the Indian Ocean. *Osama Bin Laden: FAQ*, www.msnbc.com/news/627355.asp?cp1=1 (visited June 30, 2002). One of the biggest breaks in the embassy bombing investigation was interception of a congratulatory phone call in the days after the bombings. Bin Laden has also used faxes from remote locations and in some cases, Internet-based e-mail. In addition to encryption, al-Qaida has used various code words and aliases to disguise identities. *Id.* Other recently discovered terrorist plots, such as those of the "Shoe Bomber" and the "Dirty Bomber," will likely involve more of the same type of evidence due to the nature of the undercover operations that must be carried out in order to infiltrate these highly secretive networks.

The Ninth Circuit's ruling turns conspiracy law on its head and helps to exonerate culpable defendants based on nothing more than the government's choice of time to intervene in the conspiracy. According to *Recio's* logic, as long as a particular defendant's role in the conspiracy had not begun at the point in time that the government foiled the conspiracy's object, the government could not use the defendant's post-intervention acts to link him to that conspiracy. The *Recio* decision will therefore impede law enforcement efforts by making officials hesitant or

apprehensive about intervening in criminal activity for fear of compromising future prosecutions.

B. The Decision Below Will Impact the Prevention and Prosecution of Terrorist Conspiracies Like it Did the Drug Conspiracy But With Potentially Catastrophic Consequences.

Terrorist networks operate in substantially the same manner as complex drug organizations, but the war on terrorism is distinct in three important respects – its newness, its breadth, and, given recent efforts by terrorists to obtain nuclear, chemical, and biological capability, its much higher stakes. The similarities between terrorism and drug trafficking make the task before this Court straightforward; the differences between them make it monumental. The decision below must be reversed to ensure that justice can be done.

1. The Enemy in this War on Terrorism is Unlike Any the United States Has Faced in its History.

Al-Qaeda is believed to have operations in 60 countries and active cells in 20, including the United States. Bin Laden's assets include approximately $300 million in personal finances with which he funds a network of as many of 3,000 Islamic militants. *Osama Bin Laden: FAQ*, www.msnbc.com/news/627355.asp?cp1=1 (visited June 30, 2002). In a statement before Congressional Armed Services Committees, Deputy Secretary of Defense Wolfowitz described our adversaries:

> Our new adversaries may be, in some cases, more dangerous than those we faced in the past. . . . Their decision-making is not subject to the same constraints that earlier adversaries faced. [O]sama bin Laden, Saddam Hussein and Kim Jong Il answer to no one. They can use the capabilities at their disposal without consultation or constraint – and have demonstrated a willingness to do so.

www.defenselink.mil/speeches/2001/s20011003-depsecdef.html (visited on 4/9/02).[6]

Al-Qaeda's foot-soldiers demonstrate a comparable zeal. The suicidal nature of the September 11th attacks demonstrates the kamikaze philosophy that motivates them. Al-Qaeda members' commitment has been described as "unyielding": "They film their suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States."
www.latimes.com/news/nationworld/world/la-092401alqaeda.story (visited on 4/10/02).

The approach taken by terrorist leaders demonstrates how loyalty is cultivated among conspiracy members:

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[6] The "fatwa" or religious decree issued by bin Laden on Feb. 23, 1998 further illustrates the fanaticism of America's new enemy: "The ruling to kill the Americans and their allies — civilians and military — is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Asqua Mosque [in Jerusalem] and the holy mosque [in Mecca, Saudi Arabia] from their grip, and in order for their armies to move out of all lands of Islam, defeated and unable to threaten any Muslim."
www.msnbc.com/news/627355.asp?cp1=1 (visited on 6/30/02).

> They create enclaves of like-minded people. They stifle dissenting views and do not tolerate internal disagreement. They take steps to ensure a high degree of internal solidarity.
>
> . . . .
>
> The structure of Al Qaeda . . . appears to involve small groups of relatively young men who maintain strong bonds with each other, bonds whose intensity is dramatized and heightened by the secrecy demanded by their missions and the danger of their projects.

Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 Harv. J.L. & Pub. Pol'y 429 (Spring 2002) (internal citations and quotation marks omitted).

The terrorist network is well-funded even apart from the independent wealth of its leaders. In December, 2001, the Bush administration ordered the Department of the Treasury to freeze the assets of the Holy Land Foundation and other Muslim charitable organizations and banks used as fronts to finance the militant wing of the Palestinian group Hamas, described by President Bush as "one of the deadliest terror organizations in the world today." The Foundation has recently been linked to Jose Padilla, the suspected terrorist arrested in May 2002 for his role in a plot to detonate a radioactive "dirty bomb." Ken Thomas, *Suspect worshipped at mosque once linked to alleged terrorist financing,* The Associated Press State & Local Wire, June 13, 2002. On June 12, 2002, two Lebanese brothers were convicted of smuggling cigarettes from North Carolina, where cigarette taxes are low, to higher tax states for resale, and using the profit to finance the Middle East terrorist group Hezbollah.

To date, eight conspirators have pled guilty and two others have been found guilty. Dana Priest & Douglas Farah, *Al-Qaida and Hezbollah are teaming up officials say*, The Virginian Pilot, July 1, 2002, at A1, 11. One of the brothers even raised money for the group at weekly Muslim prayer meetings, and sent $3,500 to a Hezbollah military commander in 1999. Tim Whitmire, *Two Lebanese brothers found guilty in what prosecutors said was a milestone anti-terrorism case,* The Associated Press, June 22, 2002. United States Attorney Bob Conrad noted that "[t]he fact that there are terrorist fund-raising cells in Charlotte means there are terrorist fund-raising cells elsewhere." *Id.*

The White House has acknowledged that al-Qaeda's links are "amorphous": "[T]hat's one of the ways that terrorism has so successfully operated around the world. It's hard to tell where one group begins and another group ends." www.whitehouse.gov/news/releases/2001/09/20010918-5.html (visited on 4/9/02). In fact, there is recent evidence of increased cooperation between al-Qaeda and Hezbollah – unlikely allies given their history of conflict. Dana Priest & Douglas Farah, *Al-Qaida and Hezbollah are teaming up officials say,"* The Virginia Pilot, July 1, 2002, A1, 11. News of such concerted efforts makes the threat facing this nation all the more ominous.

2. The Manner in Which Terrorist Cells Operate Mirrors that of Large, Complex Drug Organizations Such as the One Involved in *Recio*.

Like drug trafficking organizations, terrorist networks are complex and covert and can only be infiltrated through undercover efforts to apprehend conspirators and, more importantly, to thwart their planned attacks. When

asked about the difficulties in gathering evidence against terrorists, White House Press Secretary, Ari Fleischer, replied: "I think it's always accurate to say that the war on terrorism is a shadowy one. Terrorists do operate in a shadowy way. And that's why the President, from the beginning, has recognized that this is, as he put it, the new war of the 21st century ...."
www.whitehouse.gov/news/releases/2001/09/20010919-7.html (visited on 4/9/02).

Asian Studies Center Director for the Heritage Foundation, Dr. Larry Wortzel, in a Terrorism Q & A, elaborated on how this new war will be different from those of the past:

> This is a war that will involve covert action by special operations forces (Rangers, Special Forces, Navy Seals), law enforcement organizations, the US intelligence community, the Treasury Department, and the State Department. Careful information and public diplomacy operations will be part of it. I do not expect to see large bodies of troops based in a foreign country as we did in the Gulf War. When the US can operate as part of a coalition, or bilaterally with a friend or ally, it should do so. But if the only way it can attack a terrorist organization is by acting unilaterally, even through clandestine means, it must do so.

www.heritage.org/shorts/20010928terrorism.html (visited 7/10/02).

One scholar has used social network analysis to "uncover network patterns that would reveal how terrorists

organize their covert activities." *See* Valdis E. Krebs, *Mapping Networks of Terrorist Cells,* www.orgnet.com/prevent.html (visited June 17, 2002). Social network analysis is commonly used in criminal conspiracy cases, both for the purpose of prevention and prosecution. Krebs emphasized the difficulty in discovering a network that "focuses on secrecy and stealth": "Conspirators don't form many new ties outside the network and often minimize the activation of existing ties inside the network." *Id.* He explained that they rarely interact with outside contacts in order to reduce visibility and the chance of leaks out of the network.

Krebs' writings stress the crucial role of surveillance in "uncloaking" a covert network. He explained that had authorities tracked the two suspected al-Qaeda operatives known prior to September 11, they might have gathered enough information to cripple the mission. Once suspects are identified, Krebs explains, their daily activities, their interactions, visitors, conversations, travel, finances and so on, will start to reveal the network the suspects are embedded in. To act too quickly, to deport them immediately for example, would eliminate a known link and the ability to discover more of the network. *See* Valdis E. Krebs, *Can Large-Scale Terrorist Attacks Be Prevented?* www.orgnet.com/prevent.html (visited June 17, 2002).

Authorities have learned that Osama bin Laden organizes his terrorists into "cells" for the purpose of evading detection and infiltration. The basic principle behind cell organization is simple: By dividing the greater organization into many multiperson groups and compartmentalizing information inside each cell as needed, the greater organization is more likely to survive if one of its components is compromised. Dahlia Lithwick, *How Do Terrorist "Cells" Work?* September 17, 2001,

http://slate.msn.com/?id=1008311 (visited June 20, 2002). For example, had U.S. intelligence infiltrated one of the terrorist cells responsible for the September 11th attacks, they might have learned only of the proposed date of an attack but not the target, the time, or the means of the attack. The cells are structured according to their purpose:

> "Planning" or "support" cells may have fewer than 10 members, often local residents from Islamic nations, responsible primarily for fund raising. They may also be responsible for providing execution cells with drivers' licenses, cash, credit cards, or lodging, as well as procuring materials for bomb building. The members of "sleeper" or "submarine" cells may have lived in the target country for years, doing nothing until activated. According to one of Bin Laden's former aides, there are hundreds of "sleeper" terrorists across the United States. This is why several suspects from [September 11th's] attacks had no prior FBI record. "Execution cells" are brought in at the final stages of an attack. They will utilize resources supplied by other cells. Several of the hijackers from [September 11th's] attack arrived in the United States in August. "Operation commanders" may come in only at the last moment before the attack. They may be the only link between local cells and the larger umbrella organization--in this case, the central Bin Laden organization. The commander may not even perform the operation himself, often leaving the country before the terrorist attack occurs. Terrorism experts are certain a commander watched [September 11th's] attack and has escaped with the help of other U.S. cells. The commanders of both the first World Trade Center bombing in 1993 and the bombing of the U.S. embassy in Kenya are college graduates, multilingual, computer literate, and still at large.

Id.[7]

The character of these cells illustrates the vital role of covert operations in preventing terrorist attacks and the indispensable value of circumstantial evidence in prosecuting conspirators. Ideally, the government will "uncloak" the network before the planned offensive and intervene in time to thwart it; however, the decision below begs the question whether those who had not yet begun their role in the conspiracy can be brought to justice. This Court's resolution of that question will ultimately determine what

[7] Each operation has a planning cell and an execution cell, with the execution cell arriving on the scene in some cases only weeks before the attack is carried out. In most cases, like the 1993 World Trade Center bombing and the embassy bombings, an outsider recruits local country nationals to operate as a cell. Cells rarely number more than 10 people. In rare cases are the bombers — either the planners or the operators — older than 30. At the time of the 1992 bombings, the masterminds were both 25. Plans are made in one location then the bomb is made in another. In the 1993 World Trade Center bombing, the planning took place in a Jersey City, N.J., apartment, the materials were stored in a self-storage facility, and the bomb was put together in a garage. Similarly in Nairobi, the planning was done at a run-down hotel in downtown, while the bomb was put together in a suburban villa.

Officials report seeing repeated instances in which operatives encounter something unexpected, they will "go back to square one" out of fear that operational security has been breached. There is little autonomy, little spontaneity in operational matters, and changes in plans must be approved at higher levels. The cell leader on the scene can call off an operation without consulting anyone higher, said a senior intelligence official. Said one counter-terror official: "They have one idea ... alter it for them, then they go back to the drawing board. They are not agile. They have to reload, and that takes months ... about four to six months." "They are very willing to trade time for operational security." *Osama Bin Laden: FAQ*, http://www.msnbc.com/news/627355.asp?cp1=1.

means of surveillance and other covert activity, including "sting" operations, are available to law enforcement officials in their dual effort to prevent and prosecute terrorists.

CONCLUSION

Our nation currently faces a threat without historical precedent – an enemy who will readily commit the most horrendous acts against innocent civilians. Given the unique nature of this war on terrorism, this Court should proceed cautiously. The similarities between drug organizations and terrorist networks discussed above will require prosecutors to rely on precisely the same types of evidence held insufficient by the court below in order to successfully prove a terrorist conspiracy. Success in the war on terror demands that law enforcement be free to use all appropriate means to uncover planned attacks against the United States and that prosecutors be able to punish conspiracies whether or not the intended crime ensues.

For the foregoing reasons, and those expressed in Petitioner's brief, this Court should reverse the judgment below.

Respectfully submitted,

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